No. 88-597

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF GRETNA LOUISIANA, ET AL., PETITIONERS

v.

CITIZENS FOR A BETTER GRETNA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in this vote dilution case brought under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, the district court properly prohibited the practice of filling all positions on the Board of Aldermen of the City of Gretna, Louisiana, through at-large elections, where the evidence showed that black candidates supported by substantial numbers of black voters received almost no votes from white voters and hence could not be elected to the Board under the at-large system.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The City of Gretna, located in Jefferson Parish, Louisiana, has a population of 20,615. Pet. App. A41. Approximately one quarter of the voting age population is black. PX 56, at 12. Before the district court's decision in this case, Gretna was governed by a five-member Board of Aldermen who were elected at-large. It was the largest city in the State to use an at-large system. *Id.* at A41. Voters could vote for five candidates in an election for the Board. "Single-shot" or "bullet" voting (*i.e.*, voting for fewer than five candidates) also was permitted. *Id.* at A42 n.27. To be elected, candidates had to obtain a "majority" under La. Rev. Stat. Ann. § 18:511 (West 1979 & Supp. 1989). Pet.

App. A41-A42.[1] No black person was ever elected to the Board of Aldermen under this system since Gretna's incorporation in 1913. *Id.* at A34.

The plaintiffs, eleven black voters in Gretna, challenged the at-large system of electing the Board of Aldermen. They alleged that it effectively denied blacks the opportunity to elect their own representatives to the Board even though blacks comprise a significant portion of the total population of the City, in violation, inter alia, of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. Section 2(b) provides that the Act is violated where members of racial minorities "have less opportunity than other members of the electorate * * * to elect representatives of their choice."

2. After trial, the district court ruled that Gretna's at-large system of electing the Board of Aldermen violates Section 2 of the Voting Rights Act. The court found that, since 1877, the white majority in Louisiana has resisted attempts by blacks to participate in the political process. Pet. App. A25-A26. In the 1950s and 1960s, the Jefferson Parish registrar of voters required blacks, but not whites, "to state their age exactly in terms of number of years, months, and days, and to recite the preamble to the United States Constitution in order to register to vote." *Id.* at

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[1] Respondents' expert explained that a "majority" was calculated by taking the entire number of votes cast in an election, dividing by five (the number of seats), and then dividing by two and adding one. If fewer than five candidates received a majority (as was especially likely if there were a large number of serious candidates), those who obtained a majority were declared elected and a runoff election was held in which no more than twice the number of candidates as there were unfilled positions could compete (see La. Rev. Stat. Ann. § 18:482 (West 1979). If more than five candidates received a majority (as was especially likely if there were few serious candidates), the five with the most votes won. II Tr. 77-78.

A26. "Schools in Jefferson Parish remained segregated until 1971," after which they were desegregated pursuant to a federal court order. *Id.* at A27. With respect to housing, the court found that "[v]irtually all residential neighborhoods are racially identifiable." *Id.* at A29.

The court further found that, while "blacks are registered to vote at a rate equivalent to white residents of Gretna," their turnout rate is substantially lower than that of white voters. Pet. App. A30. It suggested that blacks may believe that participation in local elections is futile because, for many years, there has been an informal slating process for city offices in Gretna from which blacks have been excluded. *Id.* at A31 & n.12. The slating process has been dominated by the chief of police and the mayor, whose supporters are known as "the Miller-White faction."[2] The candidates that the Miller-White faction endorses consistently win seats on the Board of Aldermen. *Id.* at A38-A41.

Only two blacks have ever run for city office in Gretna, Edwin Romain and Leo Jones. Both ran for alderman—Romain in 1973, and Jones in 1977 and 1979. Pet. App. A33. Romain sought the endorsement of several of the incumbent aldermen in 1973, but was told to talk to Chief of Police Miller. Miller, in turn, told him "that he could not be on the slate, that he was not needed to get the black vote." *Id.* at A40. Romain was the only non-incumbent candidate in 1973 who was not invited to a meeting held for the purpose of selecting candidates for the Miller-White faction to endorse for the two seats on the Board that were being vacated by incumbents. Two

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[2] Beauregard Miller, Sr., was chief of police from 1925 until 1976, when he was succeeded by his son, Beauregard, Jr. William White was the mayor of Gretna from 1951 until recently. Pet. App. A38.

candidates were endorsed by the Miller-White faction following the meeting, and they were elected. *Id.* at A39-A40.

Romain was supported by the Westside Citizens Committee, a black political organization. Pet. App. A40.[3] He campaigned in both the black and white communities. Romain, "a light-skinned black" (*id.* at A56), testified that many of the voters did not initially know that he was black. In the first round, he finished sixth in a field of 17 candidates. Between the first round and the runoff, a newspaper article noted that Romain might become the City's first black alderman. *Id.* at A56-A57. "The evidence suggests," the district court found, that the revelation that Romain is black "had severe consequences." *Id.* at A56. In the runoff election, Romain finished last in all but the two most heavily black precincts (where he came in first and second), and last in the total vote. *Id.* at A56-A57.

Leo Jones ran for one of five open seats in 1977, and for a single open seat in the 1979 special election. Unlike the 1973 election, data was available for the 1977 and 1979 elections with respect to turnout by race and precinct. The district court found that both of those races manifested high degrees of racially polarized voting. Respondents' expert calculated that, in 1977, Jones won approximately 67 percent of the black vote and, in 1979, 66 percent, but only 12 percent and one percent of the white vote in the same elections. Pet. App. A46.[4] The court concluded that the

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[3] The record reflects that the Westside Citizens Committee generally supported the Miller-White ticket. It made an exception and supported Romain in 1973, but it did not support Leo Jones either time he ran. I Tr. 168; III Tr. 33, 46, 48-54.

[4] Respondents' expert performed bivariate regression analyses of the election returns in the 1977 and 1979 elections, a statistical analysis that seeks to determine whether there is a direct and close relationship between race and voting behavior. The regression analyses showed

results in the 1977 and 1979 elections showed a high degree of racial polarization. *Id.* at A51.

Because there were so few races in which blacks had run for office in Gretna, the court also considered how Gretna's electorate had voted in two other races involving black candidates, and found extreme polarization in those races as well. In 1979, Ben Jeffers ran for Louisiana Secretary of State, and won about 70 percent of the black vote in Gretna but only about eight percent of the white vote. Pet. App. A46. Similarly, in Jesse Jackson's run in the 1984 Democratic presidential primary, he obtained 95 percent of the black vote in Gretna, but only two percent of the white vote. *Ibid.* Two other blacks had run in statewide elections for which data was available and drew little support from either blacks or whites. The court noted, however, that one of those candidates was a "fringe candidate," while the other withdrew before the election was held. *Id.* at A46-A47 n.31.

After reviewing the factors set forth in the Senate Report on the 1982 amendment of Section 2, the district court noted that "racially polarized voting will ordinarily

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that in both the 1977 and 1979 elections there was a very high correlation between the number of blacks in a precinct and the percentage of the votes for Jones. Pet. App. A50. The expert calculated the percentage of the blacks who voted for Jones by estimating, based on the existing data, what the vote would be in a hypothetical precinct that was 100 percent black. See Pet. App. A51 n.33; II Tr. 87-95.

An extreme case analysis corroborated the regression analysis. Three of Gretna's precincts have fewer than ten black voters. Analysis of the vote in these homogeneously white precincts showed that virtually no one in those precincts voted for Jones. Pet. App. A45, A52. Gretna has no homogenous black precincts.

These two techniques—bivariate regression analysis and extreme case analysis—were also used by the plaintiffs in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and provided the basis for the finding of a Section 2 violation that was affirmed by this Court.

be the keystone of a dilution case." Pet. App. A62. Given its findings of fact, the district court then concluded that the use of the at-large system should be prohibited under Section 2. Pet. App. A67. The court ordered the defendants to propose a new election plan, and subsequently authorized elections in which four aldermen are elected from single-member districts, and one is elected at-large. *Id.* at A17 n.20.[5] Leo Jones was elected to represent a predominantly black district in the first election held under that system. Br. in Opp. 20 n.4.

3. The court of appeals affirmed. Pet. App. A1-A17. From the language of the statute and this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the court of appeals concluded that "[a]t the heart of a § 2 vote dilution claim lies the issue of whether minorities have an equal opportunity to elect their candidates of choice." Pet. App. A3. "Racial bloc voting," the court further concluded, "is the linchpin of a § 2 vote dilution claim." *Id.* at A7. The court of appeals held that the district court had not erred in finding strong evidence of racial bloc voting. *Id.* at A17.

Petitioners attacked the district court's findings by offering a factual argument based upon calculations not presented to the district court that were set forth for the first time in a lengthy appendix to their brief in the court of appeals. Petitioners urged that the district court had erred in finding that blacks could not elect candidates of their choice because, they argued, Jones never was the black voters' preferred candidate. On the contrary, they claimed, he received only 49 percent of the votes of black voters in 1979, and, in 1977, two white candidates outpolled him among blacks. They further argued (Pet. C.A.

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[5] This plan was precleared by the Attorney General under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

Br. 30) that in 1981, when none of the candidates was black, four of the five winners received biracial support and only one was elected without substantial black support. See Pet. App. A12.

The court of appeals first held, contrary to petitioners' new factual allegations, that the district court's findings were not clearly erroneous. Pet. App. A7. In addition, the court concluded that even if petitioners' new factual allegations were correct, that would not undermine the district court's finding of racial bloc voting. If Jones had obtained 49 percent of the black vote in the 1979 special election rather than the 66 percent the plaintiffs claimed, the court explained, that would still be a sufficiently significant proportion of the black vote to qualify Jones as the preferred candidate of the black voters. *Id.* at A12. The court noted that, according to petitioners' new analysis, no white candidate in the eight-way race for one seat received more than 15 percent of the black vote. Thus, even under petitioners' figures Jones received three times more support among black voters than any other candidate. In addition, according to petitioners' new figures, Jones received only 1.5 percent of the white vote. *Id.* at A12 n.12.

As for the 1977 and 1981 elections, the court of appeals concluded that since five seats were at issue and there was only one black candidate in 1977 and none in 1981, "it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters." Pet. App. A13. More significant, the court found, was that the black candidate lost in 1977, even though he received 67 percent of the black vote, because very few whites voted for him. *Ibid.* Moreover, the court held, it was proper for the district court to focus, in its analysis of racially polarized voting, upon those elections in which there was a black candidate. *Id.* at A15-A17. The court noted that in *Gingles* this Court upheld a finding of racial

bloc voting based on analysis of elections in which blacks ran for office. *Id.* at A17.

Finally, the court of appeals addressed petitioner's claim that the district court erred in considering the non-aldermanic elections involving Jeffers and Jackson. The court held that, while such so-called "exogenous" elections could not, alone, make a case of racial bloc voting as to elections for Gretna's Board of Aldermen, "the district court properly considered them as additional evidence of bloc voting—particularly in light of the sparsity of available data." Pet. App. A13.

DISCUSSION

This case involves a straightforward application of Section 2 of the Voting Rights Act and this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).[6] The courts below correctly applied established law to the facts of the case, and there is no conflict between the decision below and the decision of any other court of appeals. Petitioners' arguments—that the courts erred in finding Leo Jones to be the blacks' preferred candidate and by considering the elections in which Ben Jeffers ran for statewide office and Jesse Jackson ran for president—are based principally on factual allegations that were never brought to the attention

[6] In *Gingles*, this Court held that there are three preconditions to a finding that a multimember electoral district operates to impair minority voters' ability to elect representatives of their choice: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * *—usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

of the district court and were not accepted by the court of appeals. Accordingly, further review is not warranted.

1. The district court found racially polarized bloc voting on the basis of five elections, including three elections for the Board of Aldermen. The district court analyzed each of those three cases (1973, 1977, 1979) in detail, and found that black candidates Romain and Jones, who received a substantial proportion of the vote among blacks, were defeated by whites voting as a bloc. The court of appeals concluded that the district court's findings were not clearly erroneous. That evidence is sufficient to meet the requirement of *Gingles* that "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * *—usually to defeat the minority's preferred candidate." 478 U.S. at 51. Indeed, the evidence showed that whites never supported a black candidate for the Board of Aldermen—Romain finished last in all but the two most heavily black precincts in 1973 after the newspaper pointed out that he was black, and Jones received 12 percent and one percent of the white vote in 1977 and 1979—although they received substantial support from black voters.[7]

Ignoring the findings of the two courts below, petitioners present the case as if it were devoid of any elections in which whites, voting as a bloc, defeated the blacks' preferred candidate. Specifically, petitioners contend (see, *e.g.*, Pet. 21) that the courts below misconstrued Section 2 to protect black candidates, as such, regardless of whether they are the preferred candidates of black voters. Were

[7] Petitioners raise no challenge to the sufficiency of the evidence of vote dilution by offering nonracial "explanations of the reasons why white voters rejected minority candidates." *Gingles*, 478 U.S. at 100 (opinion of O'Connor, J.); see also *id.* at 83 (opinion of White, J.).

this the case we would agree that there had been error, since the Voting Rights Act is aimed at protecting minority voters rather than minority candidates. But no such question is in fact presented because petitioners' allegations are not consistent with the facts found below and are unsupported by the record.

The centerpiece of petitioners' argument is their claim that Leo Jones was never the preferred candidate of the black community and that, therefore, the 1977 and 1979 elections are not examples of racially polarized bloc voting. Petitioners do not dispute that Jones received virtually no support among white voters. They deny, however, that blacks supported Jones in sufficient numbers to support the finding of racially polarized voting. But the district court's contrary findings, which are subject to review under the clearly erroneous standard (*Gingles*, 478 U.S. at 79), are plainly correct.

The district court found that Jones had received about 67 percent of the black vote in 1977 (Pet. App. A46), and petitioners do not question that finding. The district court made no finding below regarding the proportion of black votes received by any white candidate, and the court of appeals declined to make its own finding on the basis of allegations made for the first time on appeal. *Id.* at A10. Petitioners nevertheless contend that Jones was not the preferred candidate of black voters in 1977 because, according to petitioners, two of the white candidates who *won* seats in that same election also received a majority—indeed, a large majority—of the black vote.[8]

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[8] Petitioners cite to nothing but their own brief in the court of appeals for the proposition that two white aldermanic candidates outpolled Jones among blacks in 1977. Pet. 10. To estimate the percentage of the black voters who voted for white candidates Le Boeuf and Bush, petitioners performed the same kind of regression analysis that

The court of appeals correctly found that factual allegation unavailing. Assuming that some of the white candidates in the 1977 election won with black support, that does not vitiate the fact that the black candidate lost because of racially polarized voting. As the court of appeals explained: "*Gingles* defines bloc voting as white majority bloc voting that defeats minority preferred candidates. * * * In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate. In the Gretna elections studied, blacks exercised their right to vote to fill all at-large positions, but only one available candidate was black. Thus, it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference." Pet. App. A13. Thus, the 1977 election shows that while blacks in Gretna supported some white candidates, whites in Gretna refused then (and every other time a black ran) to support a black candidate who was widely supported by black voters. As the court below stated, that is evidence of racial bloc voting.

In the 1979 special election for a single seat on the Board of Aldermen, the district court found that Jones received

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respondents' expert had done with respect to Jones. As the scattergram in the appendix to their court of appeals brief (at A22) shows, however, there was almost no correlation between the percentage of black voters in a precinct and the vote for LeBoeuf or Bush. While it is theoretically possible to extrapolate to an intercept and estimate the percentage of blacks who voted for the white candidates in that circumstance, the result is unreliable. See H. Blalock, *Social Statistics* 396-397 (Rev. 2d ed. 1979).

about 66 percent of the vote among blacks but was again defeated because he received virtually no votes from whites. Once more, petitioners do not contend that Jones received the support of white voters, but they maintain that he was not the blacks' preferred candidate because he actually received only 49 percent of the votes of blacks who voted. The court of appeals did not overturn the district court's finding that Jones received 66 percent of the black vote, which is the correct figure.[9] In any event, even if Jones had received "only" 49 percent of the black vote in the eight-way race for one seat in 1979, he was plainly the heavy favorite of the black voters. By petitioners' own estimates, Jones received far more support among blacks than did any other candidate; the white candidate receiving the next highest proportion of the black vote (Weigel) received only 15 percent. Pet. App. A12 n.12.

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[9] Petitioners estimated the percentage of blacks who voted for Jones in 1979 by performing a bivariate regression analysis. They used, as one variable, the percentage of voters who voted for Jones in each precinct, just as the respondents had—but using different figures. See Appendix to Appellants' Brief in the Court of Appeals A6. For example, in Precinct 1-3, 620 persons turned out to vote (*ibid.*), but only 547 of them voted in the election for the Board of Aldermen. See PX 57. Jones received 234 of the 547 votes cast for alderman. Petitioners, however, calculated that Jones had won 234 out of *620* votes. Petitioners' calculation, in other words, credited Jones with a lower percentage of the total vote than he actually received in that (and every other) precinct. Not surprisingly, when petitioners extrapolated from these figures to find the percentage Jones would have received in an hypothetical all-black precinct, they came out with a depressed figure of 49 percent. That petitioners' estimate is faulty is illustrated by the fact that the sum of the black vote for all candidates as calculated by their method is only about 86 percent rather than 100 percent. See Pet. App. A12 n.12 (sum of "black preference" column).

Thus, the lower courts correctly concluded that the elections in which Jones ran, together with the evidence regarding the candidacies of Romain, Jeffers, and Jackson, offered sufficient evidence of racial bloc voting to support a finding of dilution. The lower courts also relied, of course, on a wide variety of other evidence in concluding that, under the totality of the circumstances, there was a Section 2 violation. See Pet. App. A7, A17, A22-A43, A55-A58, A64-A67. Petitioners' contention that the court of appeals' decision protects black candidates who are unsupported by black voters has no basis in either the opinions below or the record.[10]

2. There is also no merit in petitioners' contention that the district court was obliged to ignore the evidence of racially polarized bloc voting in the 1984 Democratic presidential primary and the 1979 election for Louisiana Secretary of State. To be sure, if blacks had succeeded in electing their preferred candidates to Gretna's Board of Aldermen, there would be no violation of Section 2 here even if whites voted as a bloc against black candidates for other offices. There is no reason to conclude, however, that an election which reflects the racial voting patterns of the constituency of the jurisdiction at issue—in this case, the City of Gretna—is irrelevant.[11] As the court of appeals

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[10] Petitioners purport to raise the broader question (see Questions Presented 6 and 8) whether respondents could prove racial bloc voting if the record reflected a pattern, in elections having only white candidates, of the black-supported candidates winning. Petitioners make no argument to this effect in the body of their petition. Nor could they. No evidence was presented to the district court, by either side, regarding black voting patterns in elections for the Board of Aldermen other than those in 1973, 1977, and 1979.

[11] Petitioners consistently refer to the 1984 Democratic presidential primary and the 1979 election of Louisiana Secretary of State as "exogenous" elections. See, *e.g.*, Pet. 20. Contrary to the suggestion that

said, while such "elections alone could not prove racially polarized voting in Gretna aldermanic elections," they may be "properly considered * * * as additional evidence of bloc voting." Pet. App. A13. Indeed, such elections have typically been considered in the analysis of racial bloc voting in Section 2 cases. See, *e.g.*, *Solomon* v. *Liberty County*, 865 F.2d 1566, 1575-1576 & n.15 (11th Cir. 1988); *City of Carrollton Branch of the NAACP* v. *Stallings*, 829 F.2d 1547, 1556 (11th Cir. 1987), cert. denied, 108 S. Ct. 1111 (1988); *Smith* v. *Clinton*, 687 F. Supp. 1310, 1315 (E.D. Ark.), aff'd, 109 S. Ct. 548 (1988).

Contrary to petitioners' assertion (Pet. 17-18), there is no conflict between the lower courts' analysis of the Jeffers and Jackson races and the Eleventh Circuit's decision in *Carrollton*. In that case, the court of appeals held only that the district court did not err when it *omitted* two elections from its analysis of racial bloc voting as atypical. Specifically, the district court there had not considered a city election where the constituency was substantially smaller than the county commission election system under attack, and a statewide judicial election in which a black ran as an incumbent and won. 829 F.2d at 1558-1559. Nothing in the decision in *Carrollton* is inconsistent with the court's decision in the present case to consider other elections, featuring prominent black candidates, in which every Gretna precinct participated, and in which there was a clear pattern of racially polarized bloc voting. Indeed, the absence of a conflict is shown by the fact that the court of appeals in *Carrollton* approved the district court's consideration of the votes cast for Jackson in that jurisdiction in the 1984 Democratic primary. *Id.* at 1556.

"exogenous" implies, voters in Gretna participated in those elections, and the only figures that were studied concerned how Gretna residents voted. No votes cast outside Gretna were analyzed.

Finally, there is no merit to petitioners' contradictory complaint (Pet. 16-17) that the district court erred by not considering in detail the statewide elections in which black candidates received little support from anyone. As the district court explained, one of those candidates withdrew before the election, so little could be learned from an analysis of the support that he received on election day despite his withdrawal. Pet. App. A46-A47 n.31. And in the case of the other candidate, described by the district court as a "fringe candidate" (*ibid.*), it could not be said that whites voting as a bloc did or did not defeat the choice of the black voters in the two elections in which he ran, since he was not the black voters' choice. The courts below properly decided that those elections were not relevant to determining whether "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. In arguing that those elections are relevant, petitioners make the very error they incorrectly accuse respondents of making—confusing candidates who are black with candidates who are supported by black voters.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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